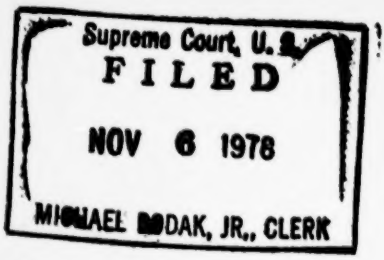

IN THE

SUPREME COURT OF THE UNITED STATES

October term, 1978

No. 78-578

IN RE JOSEPH STEINBERGER

ON PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME JUDICIAL COURT OF MAINE

PETITIONER'S REPLY MEMORANDUM

JOSEPH STEINBERGER
Waldoboro
Maine
Petitioner

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I.

Respondent admits that the Court below determined the adequacy of the Certificate on federal constitutional grounds under the due process clause. (Respondent's brief p. 10). But he then argues that Petitioner "... never

presented a federal question to the Maine Supreme Judicial Court relative to the sufficiency of the evidence to support a contempt finding ... " and that therefore this Court is without jurisdiction. (Resp. p. 12)

Petitioner raised the sufficiency issue when he claimed in his brief to the Court below "that the Certificate... is fatally deficient in its statement of the requisite basic facts." (Petition p. 5) The whole tenor of this argument involves the federal due process problem. The Court below recognized this in its opinion and discussed the issue in due process terms. (Pet. p. B-4,5) This question was essentially involved and was necessarily passed upon. This Court has ruled that in such a case the rights involved need not have been "expressly asserted below" for jurisdiction to exist. Manhattan Life Ins. Co. v. Cohen 234 US 123, 134 (1913) In fact this Court has said : "There can be no question as to the proper presentation of a federal claim when the highest state court passes upon it." Raley v. Ohio 360 US 423,

436 (1959). See also Ocala Star-Banner Co. et al v. Damron 401 US 295, 299 (1971) and Food Employees v. Logan Plaza 391 US 308, 334 (1967), Harlan, J. dissenting on other grounds.

II.

In his statement of the case, Respondent makes the misleading statement that during the trial the Justice "...then adjudicated Petitioner guilty of contempt on the grounds set forth in the certificate." (Resp. p. 6). In fact, the record shows that during the trial when the actual contempt adjudication was made, the Justice based his finding solely on the ground of Petitioner's last statement to the jury: "You'll have to bring a verdict for the Plaintiff, but I hope that you will strike a blow for the jury system and for decency by coming in with a verdict for nothing." (Pet. p. D-16). No other grounds were stated until the hearing for sentencing and the issuance of the Certificate more than a week later.

Respondent states that Petitioner is "isolating one statement made by him - his

request that the jury 'strike a blow for the jury system and for decency by coming in with a verdict for nothing'..." and not assessing the "totality" of his conduct as did the Court below. (Resp. p. 14). But this single statement is the only ground upon which the trial justice relied when the actual adjudication was made. (see above).

In its Order Denying Rehearing, The Court below recognized this by stating that its finding was based on conduct which "occured only after the presiding Justice had clarified to Appellant the significance of his granting of Plaintiff's motion for a directed verdict." (Pet. p. C-1).(emphasis added). The only such conduct stated in the Certificate is precisely the one statement which Respondent claims Petitioner is "isolating."

This highlights Petitioner's claim of unconstitutional vagueness. The Court below stated that its finding was based on one sentence spoken by Petitioner (see above). Then it judged this one sentence by assessing "...the totality of Petitioner's conduct as

set forth in the contempt certificate..." (Resp. p. 15). It went even further by assessing conduct found in the record but not in the Certificate. (See note 2 of the Opinion of the Court below - Pet. p. B-3). Thus the stated contemptuous act was judged by the "totality" of Petitioner's conduct; the only limit being the record of the case. Such a standard is unconstitutionally vague.

If an act of an attorney is to be judged by all his other acts at trial, there can be no certain standard by which the original act can be judged. The considerations are endless and unanswerable because of their multiplicity. In this sense Petitioner claims that this "totality" standard is unconstitutionally vague; that it denies due process. It denies Petitioner (and every other attorney) the ability to predict the consequences of any individual act. It denies him the right of an adequate appeal record since he cannot know the extent of the acts considered relevant.

Respondent argues that Petitioner cannot raise the issue of vagueness because "...it was never raised in the state court proceedings." (Resp. p. 13). This is wrong on two grounds:

1. Vagueness is the obverse of Petitioner's claim in the Court below that "the certificate ... is fatally deficient in its statement of the requisite basic facts." (Pet. p. 5). To claim one is to claim the other.
2. The issue of vagueness raised by this "totality" standard did not exist until the Court below ruled in the instant case. That opinion created new law by extending the standard by which contempt is judged in Maine. Petitioner's first opportunity to question this was after the Court below so ruled.

Conclusion

For the foregoing reasons and for the reasons set forth in the Petition, it is

respectfully submitted that the Petition for a writ of Certiorari be granted.

Respectfully submitted,

Joseph Steinberger
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Petitioner